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IN THE
COURT OF APPEALS OF INDIANA

DANIEL JEAN-JULIAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0607-CR-572
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven Rubick, Commissioner
Cause No. 49G04-0501-FB-356

March 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Daniel Jean-Julian appeals his conviction of Sexual Misconduct With a Minor,[1] a class C felony, and presents the following restated issues:

(1) Did the trial court err in responding to a request made by the jury during deliberation?

(2) Did the trial court err in admitting testimony?

(3) Was there sufficient evidence to support his conviction?

We affirm.

The facts favorable to the conviction are that B.B., the victim, was born on December 21, 1989. On December 21, 2004, B.B. flew from her home in Orlando, Florida, to Indianapolis in order to spend the holidays with her half-sisters Denise HanseGardner and Shannon Hanse. That evening, HanseGardner took B.B. to Jean-Julian's house to meet his wife, Karla, who was HanseGardner's best friend. In Jean-Julian's presence, HanseGardner informed everyone that it was B.B.'s fifteenth birthday. Also present were Jean-Julian's three children.

Eleven days later, on January 1, 2005, HanseGardner asked Karla to drive her husband, Felix Gardner, to work. For reasons unknown, it was decided that Jean-Julian, rather than Karla, would drive Gardner to work. When Jean-Julian arrived at HanseGardner's home, Gardner, Hanse, and B.B. were present, and Hanse and B.B. were asleep in Hanse's room. Although Jean-Julian had driven Gardner to work previously on several occasions, he awakened B.B. and asked if she would accompany him and Gardner

[1] Ind. Code Ann. § 35-42-4-9(b)(1) (West, PREMISE through 2006 2nd Regular Sess.).

to Gardner's job. Jean-Julian informed B.B. he needed her help to find his way back to HanseGardner's home because it was foggy.

At approximately 1 a.m., Jean-Julian and B.B. dropped Gardner off at Gardner's job near the airport. After dropping off Gardner, B.B. moved to the front seat of Jean-Julian's car. On the way back to HanseGardner's home, Jean-Julian made a detour in order to show B.B. a home that he was purportedly in the process of purchasing. Upon leaving the prospective home, Jean-Julian told B.B. "he ha[d] a lot of energy. He c[ould] last all night and if he did it to [B.B.] he [could] go back and do it to his wife." *Transcript* at 31. Eventually, the two returned to HanseGardner's home, but the doors to HanseGardner's home were locked and B.B. could not gain entrance. B.B. returned to Jean-Julian's car and the two went to return movies to a video store.

After dropping off the movies, Jean-Julian took an alternate route back to HanseGardner's home. Upon stopping at a red light, Jean-Julian pulled B.B.'s pants down and attempted to insert his finger into B.B.'s vagina. Jean-Julian also unzipped his pants and instructed B.B. to "jack it." *Id.* at 34. B.B. immediately "closed [her] legs and then [Jean-Julian's] phone rang and . . . he answered his phone and that's when he stopped." *Id.* at 32. B.B. told Jean-Julian to take her home, but he did not do so. Instead, Jean-Julian entered an alleyway, exited the car, and opened B.B.'s door. Jean-Julian then instructed B.B. to get out of the car. After B.B. complied with Jean-Julian's instruction, he pulled her pants down, pushed her against the car, and "started like taking his penis and putting it like around [B.B.'s] like butt and . . . then like he . . . opened the back door and pushed everything . . . towards the driver's side and pushed [B.B.] in the back seat

and then got on top of [her] and started going real real fast." *Id.* at 33. Jean-Julian's hands were around B.B.'s neck. B.B. told Jean-Julian "please don't stick it in - - stop." *Id.* at 35. Eventually, Jean-Julian stopped and they returned to HanseGardner's home.

Jean-Julian and B.B. arrived at HanseGardner's home at approximately 3 a.m. As B.B. was leaving Jean-Julian's car, he was "joking about the situation" and told B.B., "that was fun. Maybe . . . I could actually go into you next time." *Id.* Once inside, Hanse, because it was so late and B.B. had been gone for approximately two hours, asked B.B. what was wrong. B.B. eventually informed Hanse about what Jean-Julian had done. Thereafter, B.B. took a shower and went to sleep.

The State charged Jean-Julian with two counts of sexual misconduct with a minor, one as a class B felony and one as a class C felony. Following a jury trial, Jean-Julian was found guilty of class C felony sexual misconduct with a minor, but was found not guilty of the class B felony. In a separate sentencing hearing, the trial court identified no aggravating circumstances, two mitigating circumstances ((1) that Jean-Julian has no criminal history, and (2) the adverse impact of incarceration upon his dependent children), and sentenced Jean-Julian to the minimum two-year sentence. Jean-Julian now appeals. Additional facts will be included as necessary.

1.

Jean-Julian contends the trial court erred when it responded to a question posed by the jury during deliberation. The generally accepted procedure for answering a jury's question on a matter of law is to reread all instructions. *Riley v. State*, 711 N.E.2d 489 (Ind. 1999). This is done to avoid emphasizing any particular point and not to qualify,

modify, or explain the instructions in any way. *Id.* We have permitted departure from this procedure, however, when a trial court is faced with extreme circumstances, such as including an omitted and necessary instruction or correcting an erroneous instruction, as long as it is fair to the parties in the sense that it should not reflect the judge's view of factual matters. *Id.* When the jury's question coincides with an error or legal gap in the final instructions, a response other than rereading the final instructions is permissible. *Id.*

Jean-Julian argues the trial court erred when it responded to the jury's question regarding Final Instruction 16. As originally written, that instruction read:

> The crime of sexual misconduct with a minor is defined by law as follows:
>
> A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to any fondling or touching, of either the child or the older person with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits sexual misconduct with a minor, a class D felony.
>
> The offence is a class C felony if it is committed by a person at least twenty-one (21) years of age.
>
> Before you may convict the defendant, the state must have proved each of the following beyond a reasonable doubt:
>
> 1. The defendant Daniel Jean-Julian
> 2. Knowingly
>
> A) Performed/submitted to any fondling or touching
>
> *B) Of [B.B.]*
>
> 3. With the intent to arouse or satisfy the sexual desires of either [B.B.] or Daniel Jean-Julian
> 4. When the defendant was eighteen (18) years of age or older
> 5. When [B.B.] was fourteen (14) years of age but less than sixteen (16) years of age
> 6. And at the time of the occurrence the defendant was at least twenty-one (21) years of age
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of sexual misconduct with a minor, a class C felony, charged in Count II.

Appellant's Appendix at 108-09 (emphasis supplied). During deliberation, the jury presented the trial court with the following question: "Item 2 of Instruction 16 suggests that the fondling or touching must be 'of' [B.B.] The earlier paragraph says it can be either way as we read it. Please explain." *Id.* at 124. In response, the trial court provided the jury with the following explanation: "The Court's instruction should have read 'of or with.' This was a typographical error." *Id.*

The trial court's response merely redressed a typographical error, thereby correcting an otherwise erroneous instruction. The trial court's response did not overly emphasize any aspect of the case, suggest any course of action, or indicate its view regarding the facts of the case. *See Martin v. State*, 760 N.E.2d 597, 601 (Ind. 2002) ("permitted departure from this procedure when a trial court . . . must correct an erroneous instruction[] as long as it is fair . . . in the sense that it [does] not reflect the judge's view of factual matters") (internal quotations omitted). Further, our Supreme Court has stated that "Indiana Jury Rule 28 urges [] trial judges [to] facilitate and assist jurors in the deliberative process," and that "[u]nder appropriate circumstances, and with advance consultation with the parties and an opportunity to voice objections, a trial court may, for example, . . . directly answer the jury's question (either with or without directing the jury to reread the other instructions) . . . or may employ other approaches or a combination thereof." *Tincher v. Davidson*, 762 N.E.2d 1221, 1224 (Ind. 2002). Under these circumstances, the trial court's response was permissible.

2.

Jean-Julian contends the trial court erred in admitting certain testimony of Patricia Brown, B.B.'s mother, and Indianapolis Police Department Detective Daniel Green. The admission or exclusion of evidence is a determination entrusted to the trial court's discretion. *Washington v. State*, 840 N.E.2d 873 (Ind. Ct. App. 2006), *trans. denied*. We will reverse a trial court's decision only for an abuse of discretion. *Id.* A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* We will first address Brown's testimony, and thereafter address Detective Green's testimony.

Jean-Julian argues the trial court erred in admitting Brown's testimony regarding a telephone conversation she had with Jean-Julian because "she had never met Jean-Julian and that she therefore was unable to recognize him by his voice." *Appellant's Brief* at 15. The identity of the participants in the conversation must be established in order for evidence of a telephone conversation to be admissible. *Jernigan v. State*, 612 N.E.2d 609 (Ind. Ct. App. 1993), *trans. denied*. One party to the conversation may identify the voice of the other party to the conversation if she is familiar with it. *Id.* If the voices cannot be so identified, however, circumstantial evidence may suffice to identify the other party. *Id.* For instance, evidence that the recipient possessed knowledge of certain facts that only a particular person would be likely to know can be sufficient authentication. *Id.*

At trial, Brown testified that she did not previously know Jean-Julian or recognize his voice. Brown testified that she asked HanseGardner for Jean-Julian's phone number. Brown "called and asked to speak [with] Karla. [Karla] got on the phone and [Brown]

talked to her." *Transcript* at 94. "Then [Brown] asked to speak to [Karla's] husband[,]" but "he was not available." *Id.* at 95. Brown called Jean-Julian's home again, Karla answered the phone, and Brown asked to speak with Jean-Julian. When Karla handed the phone to Jean-Julian, Brown asked "him if he was DJ or Daniel. He said, yes." *Id.* at 96. Brown then asked Jean-Julian "why did you do this to my daughter[,]" and Jean-Julian responded, "I don't know. I'm sorry. I'm sorry. I'm sorry. That's all he kept telling [Brown] [was] I'm sorry." *Id.*

Although Brown was unfamiliar with Jean-Julian's voice, under these circumstances the State presented circumstantial evidence that met the foundational requirement. Brown obtained Jean-Julian's phone number from HanseGardner, who was Jean-Julian's wife's best friend. Each time Brown called Jean-Julian's number, the woman who answered the phone identified herself as Karla, which is Jean-Julian's wife's name. When Brown asked the male with whom she spoke whether he was "DJ or Daniel[,]" the male responded affirmatively. *Id.* We note that at least two witnesses at trial, HanseGardner and Hanse, referred to Jean-Julian as "DJ". Further, in response to Brown's question regarding B.B., the male speaker responded "I'm sorry" repetitiously. *Id.* at 96. Jean-Julian's identity need not be proved beyond a reasonable doubt, and any conflicts or doubts in the proof of his identity go to the weight of the evidence and not its admissibility. *See Jernigan v. State*, 612 N.E.2d at 612 ("caller's identity need not be proved beyond a reasonable doubt"). The trial court, therefore, did not err in admitting this evidence.

Jean-Julian next argues the trial court erred by admitting Detective Green's testimony regarding his birth date because it was inadmissible hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted[,]" Ind. Evidence Rule 801(c), and is generally inadmissible. Ind. Evidence Rule 802.

At trial, the State asked Detective Green whether, "as part of [his] investigation[,]" he "learn[ed] Mr. Julian's date of birth[.]" *Transcript* at 117. Detective Green indicated he knew Jean-Julian's birth date and stated it. Upon further questioning, however, Detective Green provided that the basis of his knowledge regarding Jean-Julian's birth date was a computer database, and that he neither inputted that data nor knew who did. Jean-Julian objected to Detective Green's testimony as inadmissible hearsay. The State essentially responded that Detective Green's testimony was not hearsay because it was not being offered for the truth of the matter asserted, *i.e.*, that Jean-Julian was born on December 2, 1982. Rather, the State asserted that "[i]t's part of [Detective Green's] investigation. He had to determine the basic information about that particular person - - the name, where he resided, his age, date of birth just for the limited purposes of establishing where his investigation took him but just that piece of information is all that the State is illiciting [sic]." *Id.* at 119. The trial court overruled Jean-Julian's objection and permitted Detective Green to testify regarding Jean-Julian's birth date.

We begin by noting that within the context of the trial, Detective Green's testimony was clearly offered to prove the truth of the matter asserted. There does not appear to be any other reason the State would have elicited testimony regarding Jean-

Julian's birth date (for example, to prove identity), nor any reason to seek that information to the exclusion of other preliminary information such as Jean-Julian's residence or name. The actual purpose for eliciting this information becomes especially apparent in light of the fact that Jean-Julian's age was a necessary element of the offense with which he was charged. As Detective Green's testimony was offered to establish Jean-Julian's birth date, it constituted hearsay. As such, it must come under one of the hearsay exceptions listed in Ind. Evidence Rule 803 or 804.

Detective Green's testimony does not fall under any exception to the general prohibition against hearsay. (We emphasize the State did not seek to introduce police or investigative records containing Jean-Julian's birth date, but rather in this regard relied solely upon Detective Green's testimony.) The State makes no attempt to argue Detective Green's testimony was properly admitted, merely asserting "[t]his Court need not address Jean-Julian's argument on the admissibility of Detective Green's testimony . . . ." *Appellee's Brief* at 8. Under these circumstances, we conclude the trial court abused its discretion in admitting Detective Green's testimony regarding Jean-Julian's birth date. The admission of the hearsay testimony, however, was harmless error because it was merely cumulative of HanseGardner's testimony (as discussed below) and did not affect Jean-Julian's "substantial rights[.]" *Forler v. State*, 846 N.E.2d 266, 271 (Ind. Ct. App. 2006).

3.

Jean-Julian contends there is insufficient evidence to support his conviction because, absent Detective Green's testimony, "[t]he only other evidence in the record that

even purports to address Jean-Julian's age is" HanseGardner's testimony in which she stated, "'I think [Jean-Julian is] about 25 but I am not certain.'" *Appellant's Brief* at 22 (quoting *Transcript* at 61). When reviewing a claim of insufficient evidence, we neither reweigh evidence nor assess the witnesses' credibility. *Tormoehlen v. State*, 848 N.E.2d 326 (Ind. Ct. App. 2006), *trans. denied*. Rather, we look to the evidence and reasonable inferences drawn therefrom that support the verdict. *Id.* We will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id.*

Jean-Julian challenges only the sufficiency of the evidence regarding whether he was at least twenty-one years old, which was a necessary element of the offense of sexual misconduct with a minor as charged. *See* I.C. § 35-42-4-9(b)(1). "[C]ircumstantial testimonial evidence can be sufficient to prove age." *Staton v. State*, 853 N.E.2d 470, 474 (Ind. 2006). Further, "[t]he opinion of a witness as to the age of the accused, based on personal observation, is sufficient evidence of age, if believed by the jury, to support the conviction." *Chrisp v. State*, 372 N.E.2d 1180, 1181 (Ind. 1978); *see also Dew v. State*, 373 N.E.2d 138, 140 (Ind. 1978) ("identification coupled with a statement by a witness as to his opinion of the defendant's age[] will be considered sufficient evidence on this issue"); *Bobbitt v. State*, 361 N.E.2d 1193, 1196 (Ind. 1977) ("age can be established by a witness giving his observation of the appellant").

In *Staton v. State*, 853 N.E.2d 470, the defendant was charged with sexual misconduct with a minor, which, as charged, required the State to prove beyond a reasonable doubt that the defendant was over eighteen years old. Following a jury trial,

the defendant was convicted and subsequently challenged the sufficiency of the evidence regarding his age. Upon appeal, our Supreme Court stated:

> [t]he age of a defendant should be an easy element to prove, and the State could presumably have established it through documentary evidence, other witnesses, or through public records. It is tempting to find that this ease of proof leads to a requirement that the State present conclusive evidence of age. But the ease of proof cuts both ways. Staton offered nothing to rebut [the witness's] testimony. The jury can apply its common sense to this record.

Staton v. State, 853 N.E.2d at 475. Based upon this reasoning, the Supreme Court determined that the witness's testimony that she "imagined" or "understood" the defendant to be eighteen was sufficient evidence to support the conviction, *id.*, and concluded "it was a permissible inference for the jury to find that age was established beyond a reasonable doubt." *Id.* at 476.

Likewise, in *Chrisp v. State*, 372 N.E.2d 1180, the defendant contended opinion evidence was insufficient to prove his age. Our Supreme Court, however, affirmed the defendant's conviction and held there was sufficient evidence establishing the defendant's age where the only evidence thereof was a police officer's testimony that, "in his opinion appellant was over twenty-one years of age, possibly twenty-three or twenty-four." *Id.* at 1181; *see also Thompson v. State*, 386 N.E.2d 682, 684 (Ind. 1979) (sufficient evidence of age where police officer "testified that from his experience it was his opinion that the defendant was twenty-five years old[,]" which was "sufficient to prove age if believed by the jury"); *Moore v. State*, 369 N.E.2d 628, 632 (Ind. 1977) (witness's testimony "that he thought appellant was 'around twenty-eight'" and the fact that "the jury was able to observe appellant's appearance" constituted sufficient evidence

of defendant's age); *Bullock v. State*, 382 N.E.2d 179, 180 (Ind. Ct. App. 1978) (sufficient evidence of age where police officer testified "that he had previously arrested people over sixteen years of age, and that he believed the [d]efendant to be between twenty-five and thirty years old" and "the jury had the opportunity to observe the [d]efendant and surmise from his appearance that he was more than sixteen years old").

In this case, HanseGardner testified that she believed Jean-Julian was "about 25". *Transcript* at 61. HanseGardner was the best friend of Jean-Julian's wife and had known Jean-Julian for several years. Further, several witnesses testified that Jean-Julian was married and had three children. *See, e.g.*, *Marshall v. State*, 643 N.E.2d 957 (Ind. Ct. App. 1994) (finding of sufficient evidence of age based in part upon testimony that defendant was married and had two children over six years old), *trans. denied*. In addition to this testimony, the jury was able to observe Jean-Julian's appearance during the two-day trial. HanseGardner's opinion regarding Jean-Julian's age combined with the jury's observation of Jean-Julian during trial, therefore, constitutes sufficient evidence under the circumstances of this case that Jean-Julian was twenty-one years old.

Judgment affirmed.

KIRSCH, C.J., and RILEY, J., concur.